

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAVE WRZESINSKI, et al.,

Plaintiffs,

vs.

HOME FINANCE OF AMERICA, et al.,

Defendants.

Case No.: 2:10-cv-01052-GMN-RJJ

ORDER

Before the Court are two Motions to Dismiss (ECF Nos. 4 & 17). One Motion (ECF No. 4) was filed by Defendant CitiMortgage, Inc., the other (ECF No. 17) was filed by Chicago Title Agency of Nevada, Inc. (“CTN”), which is the survivor by merger of named Defendant United Title of Nevada (“UTON”). The other three Defendants named in the Complaint (ECF No. 1)--Home Finance of America (“HFA”), Mortgage Electronic Registration System, Inc. (“MERS”), and Cal-Western Reconveyance Corporation (“CWRC”)--have not appeared in this case. Plaintiffs have attempted to prove service of these defendants by providing copies of certified mail receipts indicating that some sort of letters were sent to these defendants’ general business addresses. (ECF No. 35.) Plaintiffs have not executed an affidavit indicating what was actually contained in the certified mail sent to these defendants, nor have they indicated that this form of service is permissible in the states in which the defendants are located: Pennsylvania, Virginia, and California.

For the reasons that follow, Plaintiffs' Complaint is DISMISSED without prejudice. If Plaintiffs decide to amend their Complaint, it must be filed within twenty-one (21) days of the date on which this Order is entered.

1 I. BACKGROUND

2 The Complaint and factual allegations contained therein are a bit incoherent, but
 3 this lawsuit appears to arise from the institution of foreclosure proceedings against the
 4 home of Plaintiffs Dave Wrzesinski and Cheryl Wrzesinski (“Plaintiffs”). (Compl. 5–6,
 5 ECF No. 1.)¹ According to Plaintiffs, CWRC filed ten (10) foreclosure and substitution
 6 notices with the Clark County Recorder after “Plaintiff was deemed to have failed to
 7 perform under the agreement with “HFA” contract, to make payments on the subject
 8 note.” (*Id.* at 5.) Then, Plaintiffs allege that HFA, MERS, and CWRC:

9 culminat[ed] their protracted criminal efforts by fraudulently
 10 representing to Clark County Recorder Debbie Conway, in
 11 sworn and non-sworn pleadings filed in the subject action that
 12 it indeed enjoyed equity or other assignment in relation to the
 13 subject Note, clearly possessing an understanding that such
 enjoyment was essential to standing to sue for foreclosure as
 in the subject action.

14 (*Id.* at 5–6.) Plaintiffs allege that, on that same day:

15 As presiding officer(s) and trier of fact in the subject action,
 16 and with full and prior knowledge that “CWRC”, “MERS”,
 17 “CITI”, “UTON” nor “HFA” had no equity in the subject
 Note and therefore lacked standing to sue and with intent to
 18 contribute to “HOA’s” unlawful enterprise, Defendant(s)
 Doe(s) “CWRC” chose to ignore authority.

19 (*Id.* at 5.) Plaintiffs also make references to fraud (*id.* at 2, 6), malicious prosecution (*id.*
 20 at 4), racketeering (*id.* at 4), extortion (*id.* at 6), unlawful use of mails (*id.* at 6), and
 21 numerous criminal statutes (*id.* at 6–18), but does not make clear what causes of action
 22 they are pursuing or against which of the Defendants each of those causes of action is
 23 alleged.

24
 25 ¹ There are no page numbers in the Complaint, so the page numbers used in Order reflect the numbers assigned by
 the CM/ECF system.

1 Defendant CitiMortgage, Inc. filed the first Motion to Dismiss (ECF No. 4). In its
2 Motion, Defendant contends that Plaintiffs' Complaint fails to meet the minimum
3 pleadings requirements set forth in Rule 8(a) of the Federal Rules of Civil Procedure.
4 Chicago Title Agency joined in that Motion, and filed its own Motion to Dismiss (ECF
5 No. 17), in which it argued that its predecessor, UTON, was not involved in the
6 foreclosure and that Plaintiffs can therefore not prevail on a claim against it.

7 **II. LEGAL STANDARD**

8 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of
9 action when the plaintiff fails to state a claim upon which relief can be granted. *See N.*
10 *Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a
11 motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate
12 when the complaint does not give the defendant fair notice of a legally cognizable claim
13 and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
14 (2007). In considering whether the complaint is sufficient to state a claim, a court takes
15 all material allegations as true and construes them in the light most favorable to the
16 plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

17 The court, however, is not required to accept as true allegations that are merely
18 conclusory, unwarranted deductions of fact or unreasonable inferences. *See Sprewell v.*
19 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a
20 cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts
21 showing that a violation is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
22 1949 (2009) (citing *Twombly*, 550 U.S. at 555).

23 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure
24 41(b) for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San*
25 *Bernardino Police Dept.*, 530 F.3d 1124, 1129 (9th Cir. 2008). Rule 8(a)(2) requires that

1 a plaintiff's complaint contain "a short and plain statement of the claim showing that the
 2 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Prolix, confusing complaints"
 3 should be dismissed because "they impose unfair burdens on litigants and judges."
 4 *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996).

5 Thus, a complaint may be dismissed if it is so "verbose, confused and redundant
 6 that its true substance, if any, is well disguised." *Gillibeau v. City of Richmond*, 417 F.2d
 7 426, 431 (9th Cir. 1969) (quoting *Corcoran v. Yorty*, 347 F.2d 222, 223 (9th Cir. 1965)).
 8 Such is the case with the Complaint currently before the Court.

9 If the court grants a motion to dismiss, it must then decide whether to grant leave
 10 to amend. The court should "freely give" leave to amend when there is no "undue delay,
 11 bad faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing
 12 party by virtue of . . . the amendment, [or] futility of the amendment" Fed. R. Civ. P.
 13 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only
 14 denied when it is clear that the deficiencies of the complaint cannot be cured by
 15 amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

16 **III. DISCUSSION**

17 The document filed as the Complaint in this action appears to actually be the
 18 combination of two Complaints. The first is two (2) pages long, while the other is twenty
 19 (20) pages in length. Neither of these complaints complies with Local Rule of Civil
 20 Practice 10-1 (governing the form of papers filed in this Court and requiring, *inter alia*,
 21 that all pages of each pleading be numbered consecutively). On the final page of the
 22 aggregated Complaint, in the section labeled "VERIFICATION," Plaintiffs refer to this
 23 document as a "criminal complaint," writing:

24 Complainant (undersigned) brings this criminal complaint in
 25 good faith with clean hands and as required by law, and they
 fully believes [sic] that the allegations of lawlessness on the

1 part of the Defendant(s) above named are true and correct,
2 and that they constitute the crimes alleged herein, acts for
3 which Complainant seeks the full imposition of all sanctions
provided for by law.

4 (Compl. 22, ECF No. 1). Plaintiffs elsewhere note that they “reserve[] the right of filing
5 additional criminal charges” (*id.* at 20.) The Court agrees with Defendant
6 CitiMortgage that these items create the question of what function Plaintiffs actually
7 intended the Complaint to serve. (*See* Mot. to Dismiss 8–10, ECF No. 4.) If this is
8 intended as a Criminal Complaint, then it must be dismissed, as “[c]riminal proceedings,
9 unlike private civil proceedings, are public acts initiated and controlled by the Executive
10 Branch,” *Clinton v. Jones*, 520 U.S. 681, 718 (1997), and neither Plaintiff is purporting to
11 be a member of the Executive Branch.

12 Assuming, *arguendo*, that this Complaint is intended to be a complaint in a civil
13 action, the Complaint is insufficient to give the Court and the opposing parties notice of
14 what causes of action Plaintiffs are alleging and against whom those claims are being
15 alleged. Plaintiffs make generalized grievances regarding fraud and malicious
16 prosecution, but also devote thirteen (13) pages to quoting federal and state statutes
17 verbatim, including little to no guidance as to how those statutes relate to the facts of this
18 case or the causes of action that Plaintiffs might be alleging against Defendants.
19 Although these statutes might somehow be related to the mentions of racketeering
20 included throughout the Complaint, the Complaint is far from clear in this regard.
21 Further, it is unclear which of these statutes and grievances apply to each party.
22 Although Plaintiffs write “[i]n relation to Defendant “HFA” [sic] its counselors,
23 defendant(s), co-conspirators, “CWRC”; “CITI”; “MERS”; “UTON”, Doe(s) and shall be
24 deemed to be included in any allegation where such would be appropriate in the context
25 conveyed in the allegation,” (Compl. 4, ECF No. 1), this hardly clarifies which

1 allegations pertain to which party. Indicating that the allegations that apply to a party are
2 the allegations that would appropriately apply to the party in the context of the allegation
3 borders on circular reasoning and does not put Defendants on adequate notice of what
4 claims are pending against them.

5 This is exactly the sort of Complaint that Judge Kleinfeld warned about in
6 *McHenry*. A judge could spend a full day trying to sort through the allegations and
7 statutes cited in this Complaint in an effort to determine what Plaintiffs are claiming and
8 Defendants could do the same, but it is still unlikely that the judge and all of the parties
9 would have a similar view of exactly what causes of action are being pleaded in this
10 Complaint. It is jumbled and largely unintelligible, and its substance, if it exists, is
11 extremely difficult to decipher. As such, Defendants are not put on adequate notice of
12 the claims against them, and this case must be dismissed. Plaintiffs will be given twenty-
13 one (21) days to file an Amended Complaint.

14 **CONCLUSION**

15 IT IS HEREBY ORDERED that the Complaint is DISMISSED without prejudice
16 and the Plaintiffs are given twenty-one (21) days in which to amend the Complaint. The
17 Motions to Dismiss (ECF Nos. 4 & 17) are GRANTED to the extent they conform to this
18 Order. Plaintiffs are advised to follow all of the relevant Local Rules and to lay out each
19 of its causes of action--and the defendants that each applies to--in a coherent, systematic
20 manner, being certain to allege facts showing that such a cause of action is plausible, not
21 just possible. Plaintiffs should also be certain to note in the complaint whether it is
22 designed to initiate a criminal or a civil action. Plaintiffs must be sure to serve all parties
23 with its amended complaint.

24 IT IS FURTHER ORDERED that the Court will cause this dismissal to become
25 with prejudice if Plaintiffs do not comply with the Court's Order.

1 IT IS FURTHER ORDERED that all other motions currently pending in this
2 action are DENIED, without prejudice, as moot.

3 DATED this 7th day of December, 2010.

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Gloria M. Navarro
7 United States District Judge
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